

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED
August 16, 1996
Cecil W. Crowson
Appellate Court Clerk

KENNETH ALLEN ARVIN, JR,)
)
 Appellee)
)
 V.)
)
 DAVID MILLS, WARDEN,)
)
 Appellant)

NO. 01C01-9510-CC-00322
HICKMAN COUNTY
HON. CORNELIA A. CLARK
JUDGE
(Habeas Corpus)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Kenneth Allen Arvin, Jr., appeals as of right the trial court's dismissal of his petition for a writ of habeas corpus. We affirm the judgment of the trial court.

In November 1980, the appellant was convicted of second degree murder and sentenced to serve ninety-nine years in the Tennessee Department of Correction. On June 28, 1995, the appellant filed a petition seeking a writ of habeas corpus. The sole basis upon which he claims entitlement to the writ of habeas corpus is that the trial court used the term "moral certainty" when it instructed the jury on the definition of reasonable doubt. On direct appeal, the appellant's conviction was affirmed by the Court of Criminal Appeals on August 13, 1982 and the Supreme Court denied his application for permission to appeal on November 1, 1982. The appellant has filed two prior post-conviction petitions. Both petitions were dismissed and appealed to this court. The dismissal of his first post-conviction appeal was affirmed by this court. His second post-conviction appeal was dismissed by this court. In both cases the Supreme Court denied the applications for permission to appeal.

The trial court dismissed the appellant's latest petition without the appointment of counsel or an evidentiary hearing. The trial court dismissed the petition based, in part, upon the following findings:

- (1) This is not a proper petition for habeas corpus relief. Petitioner does not allege that his conviction is facially invalid or that it has expired. Petitioner has not attached a copy of the judgment order or jury instructions, and has not given a satisfactory reason for his failure to do so. TCA § 29-21-107(b)(2).
- (2) Relief under the post-conviction petition act is barred in this case because the statute of limitations has expired. TCA § 40-30-102. By filing two prior such petitions, including one in 1992, the defendant has also waived the right to raise this issue. TCA § 40-30-112. In any event such a petition would have to be filed in Marshall County.

Additionally the trial court determined that were his claim to be viewed on the merits, the appellant stated no cognizable claim for post-conviction relief.

Because we agree that the appellant did not claim that his conviction was void or that his sentence had expired, the trial court properly refused to treat this petition as one seeking habeas corpus relief. Although Tennessee Code Annotated section 40-30-205(c) allows a trial court to treat a petition for habeas corpus as one for post-conviction relief, under the circumstances of this case, dismissal of the petition was appropriate. Tennessee Code Annotated section 40-30-204 provides that a petition for post-conviction relief shall be filed in the county of the petitioners' conviction. In this case, the appellant was convicted in Marshall County but filed his petition for relief in Hickman County. The trial court lacked authority, statutory or otherwise, to order the case transferred to Marshall County. See Norton v. Everhart, 895 S.W.2d 317, 320 (Tenn. 1995). Accordingly, the trial court properly dismissed the petition.

Finally, we agree that the appellant has not stated a constitutional claim for relief such that post-conviction relief should issue. As the trial court correctly recognized, in State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed. 2d 791(1995), our supreme court held that the use of the term "moral certainty" when instructing a jury on reasonable doubt does not by itself render the instruction unconstitutional. Referring to an instruction almost identical to the instruction given in the appellant's case the court said,

We conclude, however, that the use of the phrase "moral certainty" by itself is insufficient to invalidate an instruction on the meaning of reasonable doubt. . . . When considered in conjunction with an instruction that '[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict,' we find that the instruction properly reflects the evidentiary certainty required by the 'due process' clause of the federal constitution and the 'law of the land' provision in our state constitution.

Id.

In light of the above-quoted language and the fact that the instruction given in the appellant's case was essentially the same as the instruction at issue in Nichols, we

agree with the trial court that the appellant did not state a colorable claim either for post-conviction relief or the writ of habeas corpus.

Accordingly, the judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID G. HAYES, JUDGE